

reasonably fit for that purpose, except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill and judgment of the seller.

Further, by s 14(2), in the case of a seller who sells goods in the course of business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition as regards defects specifically drawn to the buyer's attention before the contract is made; or if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.

If there has been a breach of contract, it is immaterial whether or not the seller has been negligent; he is equally liable for latent defects in the articles which he sells, as for defects discoverable on reasonable examination.

As the plaintiffs in this case are both the sellers and manufacturers of the NTP supplied to the defendants, they are liable to the defendants both in contract for breach of contract, and in tort for negligence in the manufacture of the NTP.

Independent of any warranty, a person who manufactures and sells an article owes a duty to take reasonable care in its design and manufacture. The duty is not to cause injury to the consumer's person or property (34 *Halsbury's Laws of England* (4th Ed) p 32 para 37).

The duty of care arises where the manufacturer sells the article in such a form as to show that he intends it to reach the user in the form in which it left him, without any reasonable likelihood of such intermediate examination as would have revealed the danger, and the article is put to the use for which it is intended (34 *Halsbury's Law's of England* (4th Ed) p 33 para 38).

In the result there will be judgment for the defendants on their counterclaim and costs and for damages to be assessed.

Defendants' counterclaim allowed.

Solicitors: *WK Tan & Co; S Gunaseelan.*

Reported by *Terence Tan Bian Chye*

A **Pek Seng Co Pte Ltd & Ors v Low Tin Kee & Ors**

HIGH COURT (SINGAPORE) — SUIT NOS 359, 360, 7031,
2673 OF 1984 AND 4406 OF 1986
CHAN SEK KEONG J
29 SEPTEMBER 1989

B *Companies and Corporations — Lifting the corporate veil — Company and wholly-owned subsidiaries — Mareva injunction*

C *Civil Procedure — Mareva injunction — Assets subject to injunction — Lifting the corporate veil — Company and wholly-owned subsidiaries — Companies controlled by one dominant shareholder and director — Execution of judgment — Stay pending counterclaim by judgment creditor*

The third defendant obtained judgment against the first plaintiff in a separate action. The present action was brought by the first plaintiff and its wholly-owned subsidiary (second plaintiff and third plaintiff) against various defendants, including the third defendant. Execution of the third defendant's judgment was stayed pending resolution of the counterclaim of the plaintiffs. The third defendant obtained an ex parte Mareva injunction prohibiting the first plaintiff from dealing with the assets of the second plaintiff and the third plaintiff. The second plaintiff and the third plaintiff moved to have the injunction dissolved. It was common ground that the first plaintiff was controlled by a person who was the dominant director in the first plaintiff, the second plaintiff and the third plaintiff.

Held, dismissing the application:

(1) The court was of the view that there was a real risk of the assets of the first plaintiff and its subsidiaries being dissipated.

F (2) This conclusion did not involve a finding that the group enterprise consisting of the first plaintiff, the second plaintiff and the third plaintiff was a sham or that it was set up for a fraudulent purpose or dishonest intent. The finding was that their dominant director was in a position factually as well as legally to dissipate the assets of the companies.

G (3) The second requirement for a Mareva injunction is the existence of assets within the control of the party against whom the injunction is sought. In the normal case, assets of a wholly-owned subsidiary are not subject to such an injunction.

H (4) However, the court was satisfied that the dominant director had full and untrammelled control, in law and in fact, over the assets of the companies. It was necessary, to lift the corporate veil, to prevent him from concealing the assets from creditors. It is not necessary, in order to lift the corporate veil, to find that the defendant is the alter ego of the company. The crucial element is effective control. The interim Mareva injunction, as varied by the agreement of the parties, was continued until the trial of the action.

I [Editorial Note: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No 103 of 1989.]

Cases referred to

- 1 *The Maritime Trader* [1981] 2 Lloyd's Rep 153 (refd)
- 2 *Re A Company* [1985] BCLC 333 (folld)
- 3 *Aspatra Sdn Bhd & Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 (folld)
- 4 *Salomon v Salomon & Co Ltd* [1897] AC 22 (refd)

Davinder Singh for the second plaintiffs.
Kan Ting Chiu for the third defendants.
Gan Hiang Chye for the fourth defendant.

Cur Adv Vult

Chan Sek Keong J: This is an application by Pei Huat Pte Ltd ('PH') and Peck Chuan Development Pte Ltd ('PC') ('the subsidiaries'), the wholly-owned subsidiaries of Peck Seng Co Pte Ltd ('PS') who are the plaintiffs in these consolidated actions, for, inter alia, an order to set aside a Mareva injunction obtained ex parte by Lomania Ltd ('Lomania'), the third defendants, on 14 March 1989 in the following terms:

Pek Seng Co (Pte) Ltd whether by itself its directors its officers subsidiary companies servants or agents or otherwise howsoever be restrained from removing from the jurisdiction of this court charging selling dealing with transferring diminishing or in any other way whatsoever disposing of its assets of whatever description within the jurisdiction of this court or the assets of whatever description within the jurisdiction of this court of Pek Chuan Development Pte Ltd or of any other subsidiary company which is within the power of Pek Seng Co (Pte) Ltd or of any of its directors servants or agents to control, save and in so far as the value of the same unencumbered exceeds the sum of \$5,793,275.55 until after the determination of Lomania Ltd's notice for further directions filed 7 March 1989 or further order in the meantime.

The material facts are as follows. On 24 February 1987, Lomania obtained judgment against PS for the sum of \$4.27m in Suit No 2673 of 1986. Execution on the judgment has been stayed pending the trial of PS's counterclaim in the said action. PH became a wholly-owned subsidiary of PS in 1975 and PC achieved the same status in 1989. It is common ground that PS is effectively controlled by one shareholder, Pek Tiong Seng ('PTS') and that PH and PC are controlled by PS. At the date of hearing of this application, each of the said companies had two directors, one of whom was PTS and the other his nominee. PTS therefore has effective control of the subsidiaries, whether directly as the dominant director or indirectly through PS.

PC carries on the business of real estate development and investment with a net worth of \$4.29m as valued by a firm of accountants as at July 1988. Its assets consisted of 13 units of offices in Pek Chuan Building worth about \$2.63m as at October 1988, and fixed deposits in a bank. Its income is derived from the sale of the units, rentals and interest on the fixed deposits. PH's only asset is its claim against the defendants in these consolidated actions.

After the hearing of this application, the parties came to an agreement to vary the Mareva injunction to allow PH and PC to proceed to carry on their ordinary businesses and to pay their legal costs of PH and PC. Accordingly, in this judgment, I shall only consider the principal complaint of the subsidiaries that the injunction ought not to have been granted, or at least not in the present form.

A Counsel for the subsidiaries advanced two arguments in support of this complaint: (i) there was no real risk of PS dissipating its assets, and (ii) if there is, the injunction should not apply to the assets of PH and PC as these assets did not belong to PS: see *The Maritime Trader*.¹ It was further contended that the injunction, in so far as it affected the assets of the subsidiaries, was effective only if such assets were treated as the assets of PS and that this was legally possible only if the corporate veils of the subsidiaries were lifted, and that in the present case there was no justification for doing so. Counsel referred me to *Farrar's Company Law* (2nd Ed) at pp 60-66, where the author has conveniently classified the decisions where the courts have lifted the corporate veil into seven categories, viz agency, fraud, group enterprises, trusts, enemy, tax and companies legislation. Counsel submitted that the present case did not fall within any of these categories. Counsel sought to distinguish the decision of *Re A Company*² where the Court of Appeal upheld the lifting of the corporate veil by the judge in granting a Mareva injunction on the ground that there was an element of fraud in that case.

E Counsel further contended that as Lomania had earlier in these proceedings taken the position that PS and PH were separate legal entities when it made an application to strike out the counterclaim of PS on the ground that the proper claimant was PH, it should not now be allowed to, in effect, say the opposite.

F The final contention of counsel for PS and the subsidiaries was that the lifting of the corporate veils for the purpose of the injunction would also mean that for all other purposes under the law, the assets of PH and PC would be the property of PS; this would lead to the situation that no creditor of PC or PH would have any claim against the assets of PC or PH, and this could not be right. I should at this juncture add that if this argument were right, then on the same reasoning, it would mean that no creditor of PS would have any claim to the assets of PS as they would be the property of PTS, and since PTS is not the judgment debtor, Lomania would not be entitled to a Mareva injunction against his assets. The lifting of the corporate veil would therefore be self-defeating.

H The case for Lomania was that there was a real risk of PS dissipating its own assets as well as the assets of its subsidiaries. The reality of the risk lay in the absolute control of the companies by PTS who had been guilty of dishonest acts. On the issue of lifting the corporate veil, counsel for Lomania contended that the courts were guided by the general principle of doing justice on the facts of each case. Counsel referred to the decision of *Aspatra Sdn Bhd & Ors v Bank Bumiputra Sdn & Anor*³ where the Supreme Court of Malaysia approved the grant of a Mareva injunction against the assets of Lorrain Osman, the defendant, and the assets of 75 companies owned and

controlled by him. Lorrain Osman was being sued for the payment of about M\$27.6m allegedly received by him as secret profits whilst acting as a director of the appellants. The court, after stating that 'The court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved', found that there was an element of fraud in the receipt of the said moneys and that this is sufficient for the court to lift the corporate veil in order to determine whether the assets of these companies were his. The court upheld the finding of the judge that Lorrain Osman was the alter ego of these companies.

I shall first consider the element of the risk of dissipation. This is a question of fact on the affidavit evidence before me. In this regard there is incontrovertible evidence that, prior to these actions, PTS had been involved in (i) bribing a Minister of the government in order to save from compulsory acquisition, successfully as it turned out, the whole of a piece of residential land which belonged to a company in which PTS had a substantial interest and of which he was the managing director; (ii) bribing a bank officer in order to obtain a loan to develop the land; and (iii) causing falsified entries to be recorded in the books of the company to conceal the purposes of these payments. That, it was contended, was indicative of the dishonesty of PTS and his contempt for the law in his pursuit of money and the real risk that PTS would not hesitate, in order to protect his personal wealth, to take steps to render out of the reach of Lomania the assets of PS and the subsidiaries, no matter that in law, the assets might not belong to PS.

I agree with this submission. On the evidence before me, I am of the view that there is a real risk of the assets of PS and of the subsidiaries being dissipated by PTS should he think that the counterclaim of PS or the claim of PH may fail. In making this finding, I am not making a finding that the group enterprise consisting of PS, PH and PC is a sham or that it was set up for a fraudulent purpose or a dishonest intent as was the case in *Re A Company*.² However, I do say that PTS is in a position, factually as well as legally, to dissipate the assets of these companies.

The justification of a Mareva injunction is the existence of a real risk that any judgment that has been or may be obtained by the plaintiff against the defendant may not be satisfied if the defendant is allowed to continue to deal with his assets freely. Its object is to prevent it from happening. The court therefore needs only to be satisfied that two conditions exist before granting such an injunction: (1) the existence of a real risk of dissipation and (2) the existence of assets within the control of the defendant. So far as the first condition is concerned, I am wholly satisfied as to its existence, in the light of PTS's past behaviour. As regards the second condition, in the normal case, the assets have also to belong to the defendant as

assets which, in law, do not belong to him can never be subject to such restraint. Hence, the assets of a company the shares of which are wholly-owned by the defendant are, by this test of legal ownership, not subject to such restraint. Only the defendant's shares are subject to such restraint. To overcome this technical difficulty, the courts have in *Re A Company*² and in *Aspatra Sdn Bhd & Ors v Bank Bumiputra Bhd & Anor*,³ resorted to lifting the corporate veil in order to treat the assets of the company as belonging to the defendant. As regards the assets of PS and of the subsidiaries, I am also wholly satisfied that PTS has full and untrammelled control, in law and in fact, over these assets as no other person can effectively stop or prevent him from dealing with and/or disposing of such assets. That being the position, I should ask myself the question whether there is any reason why I should not continue the injunction as granted in its present form which, it would appear, drew its inspiration from the decision of the Court of Appeal in *Re A Company*.² The injunction operates on the assets of PH and PC within the power of PS or of its directors, servants or agents to control. *Re A Company*² was a case where the defendant set out to establish a network of companies with the express purpose of removing his assets from the reach of creditors. It was in that factual matrix that Cumming-Bruce LJ said at pp 337-338:

The issue between the parties thus crystallized to a consideration of a distinction which was not, as far as we know, canvassed before the judges. The first defendant submitted that it was only if the evidence disclosed that the legal structure of the companies in which the first defendant had an interest (or the legal and equitable structure of trusts created at his instigation) was a complete sham that the court, exercising jurisdiction under s 37 of the Supreme Court Act 1981, would pierce the corporate veil and look beyond the legal entitlement to the English asset in question. Counsel for the plaintiffs contended that if, in the case of any corporation or trust, the court was satisfied that the legal structure had some reality but none the less was a vehicle over which the defendant exercised substantial or effective control, the Mareva injunction was appropriate in order to prevent disposal of English assets; and discovery by interrogatories was appropriate in order to ascertain the nature and extent of the first defendant's interest once it was demonstrated (as it was) that the vehicles were directly or indirectly entitled to English assets.

In our view the cases before and after *Wallersteiner v Moir* [1974] 3 All ER 217; [1974] 1 WLR 991 show that the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. As Lord Denning MR said ([1974] 3 All ER 217 at 238, [1974] 1 WLR 991 at 1013) the companies there identified were distinct legal entities and the principles of *Salomon v Salomon & Co Ltd* [1897] AC 22 prima facie applied. But only prima facie. On the facts of the *Wallersteiner* case, the companies danced to Dr Wallersteiner's bidding. Buckley LJ disagreed on the facts about the position of IFT, but Scarman LJ held that the evidence disclosed liability in *Wallersteiner* on the ground that he instigated the loan of £50,000.

We hold that the evidence sufficiently establishes that over a period of years the servants or agents of the first defendant have on the first defendant's instructions brought into existence the sophisticated and intricate network of interrelated English and foreign companies and foreign trusts as a mechanism through which the first defendant could at will dispose of his English assets. The evidence sufficiently establishes that when, after the fraud alleged in the statement of claim, the first defendant realized that insolvency of the plaintiffs was in sight, he either then arranged that his English assets should disappear into the network of interrelated English and foreign legal structures of such complexity that only he and/or his agents could disentangle his personal interest, or in the case of some English assets, he had already achieved this confusion against the contingency of a future judgment. In either case we hold that there is ample evidence to justify the orders now sought by the plaintiffs in their revised form.

In *Re A Company*,² the defendant had formed a dishonest intention to dissipate assets before he was sued and in anticipation of being sued. He set out to take and took advantage of the law, that is to say the principle of *Salomon v Salomon & Co Ltd*,⁴ to vest his assets in corporate entities and trusts in order to conceal them from his creditor. In principle, the case where the defendant forms such an intention after he has been sued should be treated in the same way. A pre-action intention is no different from a post-action or post-judgment intention, as far as the plaintiff is concerned: such a defendant is equally dishonest as the defendant in *Re A Company*.² If it is necessary to lift the corporate veil to do justice in *Re A Company*,² it does not seem to me justice requires otherwise in the present case. Yet, if this argument is carried to its logical conclusion, it would mean that in every case where the court thinks that there is a real risk of the defendant dissipating his assets and these assets include shares or interest in corporate entities which are within his effective control, the corporate veil should be lifted. It should not be necessary for the court, in order to lift the corporate veil, to interpose a finding, as was done in *Aspatra Sdn Bhd & Ors v Bank Bumiputra Bhd & Anor*,³ that the defendant is the alter ego of the company. The crucial element is effective control. In the present case and in *Aspatra*,³ there was effective and absolute control.

I must confess that I find the logic of the above argument irresistible. If the court has formed the view that a real risk exists of the defendant taking steps to remove his assets from the reach of the plaintiff, then justice to the plaintiff can only be done by making a restraining order against any assets owned by the defendant, directly and indirectly, and within his unfettered power to dispose of. A shareholder may have no direct interest in the assets of the company of which he is a shareholder. But, in my view, it would fly in the face of reality and common sense for a court to hold, for the purpose of a Mareva injunction, that the sole beneficial owner of the shares in a company is not indirectly the owner of the net assets of that company. If the assets of a defendant were held in the form of shares in a nominee

A company, a court would have little trouble in lifting the corporate veil. There does not appear to be any valid reason for the court not to do the same thing even where the company concerned is a trading company. The Mareva injunction does not and is not intended to have the effect of a judgment that the assets of the company are the assets of the defendant. The injunction merely recognizes the commercial reality that the shares of the defendant in the company have no value save that they are represented in terms of the assets of the company, including its goodwill. Any wrongful disposal of the assets of the company must result in the diminution or even destruction of the value of the shares. The position is the same in the case where, as here, the defendant is not an individual but another company. A company has no mind except for that of its principal officer or officers.

In this case, the form of injunction has been carefully worded to apply only to the assets of PH and PC which are in the power of PS or of any of its directors, servants or agents to control. Even then it is too wide as it restrains PH and PC from charging, selling and dealing with its assets in the normal course of their business. However, this particular defect has now been remedied by the agreement of Lomania to allow the companies to carry on their businesses and to pay their ordinary debts and expenses in the normal course of business.

For these reasons, I order that the interim Mareva injunction granted on 14 March 1989 as varied by agreement of the parties, be continued until the trial of this action.

Application disallowed.

Solicitors: *Drew & Napier; Low Yeap & Co; Allen & Gledhill.*

Reported by *Terence Tan Bian Chye*